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No. 377

Court of Appeals

State of New York.

JOSEPH LANZA and SYLVESTER COSENTINO,
Plaintiffs-Appellants,

against

NEW YORK STATE JOINT LEGISLATIVE COMMITTEE OF GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel,
Defendants-Respondents.

RECORD ON APPEAL.

EDWARD H. LEVINE,
Attorney for Plaintiff-Appellant, Sylvester Cosentino,
120 Broadway,
New York, N. Y.

MICHAEL P. DIRENZO,
Attorney for Plaintiff-Appellant, Joseph Lanza,
253 Broadway,
New York, N. Y.

BORIS BERKOVITCH,
Attorney for Defendants-Respondents,
15 Broad Street,
New York, N. Y.

THE REPORTER COMPANY, INC., NEW YORK 7, N. Y.—REctor 2-0978—1957

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Notice of Appeal.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK.

JOSEPH LANZA and SYLVESTER COSENTINO, Plaintiffs, against NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel, Defendants.	Index No. 5063/1957

Sirs:

PLEASE TAKE NOTICE that defendants New York State Joint Legislative Committee on Government Operations, William S. Horan, Individually and as Chairman, Arnold Bauman, Individually and as Chief Counsel, hereby appeal to the Appellate Division of the New York Supreme Court in and for the First Department, from an order entered in the above-entitled action in the office of the Clerk of the County of New York on the 1st day of May, 1957, denying defendants' motion for judgment dismissing the complaint

Notice of Appeal

herein, and from each and every part of said order.

Dated: New York, N. Y., May 6, 1957.

Yours, etc.,

BORIS S. BERKOVITCH
Attorney for Defendants
15 Broad Street
New York 5, N. Y.

To:

Edward H. Levine, Esq.
Attorney for Plaintiff Cosentino
120 Broadway
New York 5, N. Y.

Michael P. Direnzo, Esq.
Attorney for Plaintiff Lanza
253 Broadway
New York, N. Y.

Archibald R. Watson
The Clerk of the County of New York

Order Appealed From.

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York,

Special Term, Part III,

Index Number 5063, Year 1957.

[Same Title.]

Present:

Hon. Harold A. Stevens, Justice.

The following papers numbered 1 to 2 read on this motion, Argued Dec Res this 29th day of April, 1957.

Motion Calendar No. 1951

	Papers Numbered
Notice of Motion and Annexed Compt with Mo #1950	**1-2**

Upon the foregoing papers this motion is denied.

Enter

H. A. S.
J. S. C.

Dated May 1, 1957.

Brief in Support on Mo #1950

10 **Notice of Motion.**

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York.

[Same Title.]

Sirs:

Please take notice, that on the pleadings and proceedings heretofore had herein, a cross-motion
11 will be made at a Special Term, Part III, of the Supreme Court, to be held in and for the County of New York at the County Courthouse, 60 Centre Street, in the Borough of Manhattan, City of New York, County of New York, on the 29th day of April, 1957, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, simultaneously with the hearing of plaintiffs' motion for an injunction, for an order:

I. Dismissing the complaint, pursuant to the provisions of Rule 106, subdivisions 1 and 4, of
12 the Rules of Civil Practice or, in the alternative,

II. Dismissing plaintiffs' pleading pursuant to the provisions of Section 1293 of the Civil Practice Act; and

III. Granting such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y., April 29, 1957.

Yours, etc.,

BORIS S. BERKOVITCH
Special Counsel to The New York State Joint Legislative Committee on Government Operations
Attorney for Defendants
Office & P. O. Address
15 Broad Street
New York 5, N. Y.

To:

(All Attorneys of Record.)

16 **Summons.**

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York.

[Same Title.]

Plaintiffs designate New York County as the place of trial.

17 To the above named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the plaintiffs' attorneys within twenty (20) days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, April 27th, 1957.

18

EDWARD H. LEVINE, Esq.
Attorney for Sylvester Cosentino
Office and P. O. Address
120 Broadway,
New York, N. Y.

MICHAEL P. DIRENZO, Esq.
Attorney for Joseph Lanza
Office and P. O. Address
253 Broadway,
New York, N. Y.

Complaint. 19

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Plaintiffs, by their respective attorneys, allege:

FIRST: That the defendant, New York State Joint Legislative Committee on Government Operations, was duly created in 1955 by the Legislature of the State of New York to investigate and examine the management of any State Department, Board, Bureau, Commissioner or other agencies of the State. 20

SECOND: That the defendant, William S. Horan, was duly appointed Chairman of the aforesaid Legislative Committee and the defendant, Arnold Bauman, Chief Counsel of said Committee.

THIRD: That the said Legislative Committee was empowered by the Legislature to make studies, among other things, of the operation of State Government with a view towards determining its economy, efficiency and effectiveness; administration of State Laws and the detection and prevention of unsound, improper or corrupt practices; and by virtue of the legislative law, was authorized to take testimony requiring the attendance of witnesses and such powers as are granted to Legislative Committees by the provisions of the Legislative law. 21

FOURTH: Upon information and belief, this New York State Joint Legislative Committee on

Government Operations, during the month of February, 1957, undertook to investigate the facts and circumstances concerning the alleged violation of parole of the plaintiff, Joseph Lanza, and did issue subpoenas to various witnesses to take testimony in connection therewith.

FIFTH: That simultaneously the Commissioner of Investigation, or the Acting Commissioner of Investigation of the State of New York clothed with similar powers was conducting an investiga-
23 tion of the same parole board by means of subpoenaing witnesses and taking testimony.

SIXTH: That both investigating committees were vying with each other to see which could get the most sensational headlines in the newspapers.

SEVENTH: That on or about the 12th day of April, 1957, the plaintiff, Sylvester Cosentino, was subpoenaed as a witness and called upon to testify before the Acting Commissioner of Investigation and refused to answer certain ques-
24 tions which were derived from a confidential relationship existing between the plaintiff, Joseph Lanza, client, and the plaintiff, Sylvester Cosentino, attorney. That because of the refusal of the plaintiff, Sylvester Cosentino, the attorney, to violate his obligation not to disclose confidential communications, a proceeding was commenced on the 16th day of April, 1957, to punish him for contempt, returnable before Special Term of the Supreme Court, held in and for the County of New York, and as yet not determined.

EIGHTH: That on the 5th and 6th days of February, 1957, the plaintiff, Sylvester Cosen-

tino, attorney had an interview with the plaintiff, Joseph Lanza, his client, at the Westchester County Jail in the counsel room with no one else present and unknown to the plaintiff, and by means of some instrument or electronic device, said conversations were overheard and recorded in violation of law and without the consent or knowledge of either plaintiff.

NINTH: Upon information and belief, that the said eavesdropping and recording of the confidential talk between the attorney and the client came into the possession of the defendants, William S. Horan, Chairman, and Arnold Bauman, Chief Counsel.

TENTH: That on the 26th day of April, 1957, there appeared in the Daily Press an announcement that the defendant committee, its Chairman and Chief Counsel would conduct public hearings in the Association of the Bar of the City of New York Building, at 36 West 44th Street, Borough of Manhattan, City of New York, commencing on the 29th day of April, 1957, and for several days following, wherein the defendant committee threatened to make public and divulge the contents of such illegally obtained recordings of the conversations between the plaintiff, Joseph Lanza client, and the plaintiff, Sylvester Cosentino attorney, by means of loud speakers and amplifiers, divulging and disclosing the contents of said recordings.

ELEVENTH: That on the same day, April 26th, 1957, the plaintiff, Sylvester Cosentino, verified from the defendant, Arnold Bauman, that the New York State Joint Legislative Committee on Government Operations would conduct

such hearings and would publicly divulge what was contained on the illegally obtained recordings.

TWELFTH: The plaintiff, Joseph Lanza has never expressly waived his privilege of confidential communications with his attorney which the defendants threaten to nullify in violation of the provisions of Section 353 and 354 of the Civil Practice Act.

29 THIRTEENTH: The plaintiffs assert and claim that the action of the defendants in threatening to divulge and disclose the contents of said illegally obtained recordings is wholly unlawful, contrary to law and will deprive the plaintiff, Joseph Lanza, of a right which he has not expressly or impliedly waived.

FOURTEENTH: The plaintiffs claim that the threatened acts and conduct of the defendants would cause injury and damage to the plaintiffs which is irreparable and wanton.

FIFTEENTH: The plaintiffs assert that they
30 have no adequate remedy at law unless the threatened acts of the defendants are enjoined immediately.

SIXTEENTH: That by reason of the foregoing, the plaintiffs assert that a judicial determination of their rights is desirable and necessary in order that all other persons similarly situated may not be deprived of their privilege of confidential relationships between an attorney and client. It is, therefore, advisable to request the Court to make a declaration of the rights of the parties in the nature of the relief to which plaintiffs may be entitled.

WHEREFORE, plaintiffs pray that a declaratory judgment be made and entered herein, adjudging and decreeing the following:

1. That the defendants and all others who are acting under their supervision be enjoined and restrained from carrying out the threat to divulge the confidential communication contained in those illegally obtained recordings.

2. That the defendants, their agents, servants and/or employees be directed to destroy the said illegally obtained recordings or to effectually suppress the use of the contents of said recordings illegally obtained.

3. That it be further ordered, adjudged and decreed that the defendants be enjoined and restrained from using or resorting to any of the contents of the said recordings.

4. That an order be made pending the determination of this action enjoining and restraining or in anywise using or making public any of the contents of said recordings or transcripts made thereof, and for such different and further relief as may be proper in the premises.

Yours, etc.,

MICHAEL P. DIRENZO, ESQ.
Attorney for Plaintiff, Joseph Lanza
EDWARD LEVINE, ESQ.
Attorney for Plaintiff, Sylvester Cosentino

(Verified April 27, 1957, by Sylvester Cosentino and Michael P. Direnzo.)

34 **Opinion of Stevens, J.**

Plaintiffs move for an injunction *pendente lite* to restrain defendants from using a certain recording or recordings of conversations between plaintiffs as attorney and client.

Plaintiff Cosentino alleges that he was retained as counsel for plaintiff Lanza, that in such capacity he visited him at the prison in which Lanza was incarcerated; that without the knowledge or consent of either, an electronic device had been installed to and which did record their conversation and that defendants now propose to publicize or broadcast the recording, a copy or transcription thereof. Plaintiffs contend this is an invasion of the privilege existing between attorney and client.

35

Defendants argue that the record held by them is a copy of a copy which has been heard by others in transcribing same, and therefore no privilege exists. They contend that there is no power in this court to restrain its use by defendants; that the conversation having been overheard (by electronic device), no privilege attaches; that Cosentino was not the attorney for Lanza, but even if he was, no privilege attaches.

36

Defendants contend that being a validly constituted legislative committee, and their ultimate objective being within the authority granted, we have no power to interfere with their discretion as to the admission of any evidence, however obtained. They cite State Educational System (285 N. Y. 1), in support of their position. That portion of the case to which they refer was an application to vacate a subpoena *duces tecum* and challenged the power of a joint legislative committee to require the production of appellant's membership list. The Court held that the com-

mittee had the power to issue such a subpoena, and used language to which our attention is directed forbidding "interference by the Court with the action of legislative bodies or the exercise of their discretion in matters within the range of their constitutional powers." That case has no application here. There was no specific privilege, existing in law, involved in that case, and as the Court pointed out they could not say, in advance, as a matter of law that the challenged subpoena would be futile as an aid to the legislative inquiry. 38

Though a committee be regularly and validly constituted, its objective legitimate and within the framework of the power conferred, that is not a license to use any and all methods for the acquisition of information. We are still a government of laws, and the courts will seek to protect the rights of persons against possible abuse in the invasion of established or recognized rights. The committee is not above the law if it infringes upon an area not impliedly or actually necessary to the performance of its proper functions, or seeks to negate a privilege long recognized in the law. It is immaterial that one of the parties is a convicted person. It is of equal importance that the rights of such a person be protected as that those of a person first accused be safeguarded. A system of law dual in interpretation and application could not long endure, nor could a government founded upon such a system survive indefinitely. 39

But, the committee argues, this conversation was overheard (by an electronic device) subsequently transcribed, and heard by the persons transcribing same so the privilege is lost. It is

true that the courts have said a communication is not confidential if made in the presence of a third person, and not privileged if a telephonic conversation is intercepted. In the first instance it is apparent that the communication was not made with the intention of confidentiality. In the second, the party aware of certain risks attendant upon the method of communication selected, assumed those risks.

Here we have a situation where an attorney sought to confer with his client. Under time-honored custom, sanctioned in common-law, reaffirmed in New York by statute, a privilege attached if the communication was both professional and confidential. The very aura surrounding the visit, to wit, the signing of the counsel book, the ushering of counsel into a special room where he and his client could be and were alone, evinces the intention of confidentiality. We find on the papers before us that plaintiff Cosentino was the attorney for Lanza at that time. The three affidavits of three parole officers dated April 26, 1957, which were not served on plaintiffs up to the time of the hearing of the motion; are remarkably similar in language and conclusions and do not convince us to the contrary. The plaintiffs and Lanza's present counsel state that Cosentino was Lanza's attorney. It would seem that the two officers of the court and the former parolee are better equipped than the parole board to determine the relationship.

This is not the case of a private third person overhearing a conversation because of the fault or carelessness of one or both parties. Obviously under such a condition there is no privilege, for the parties have impliedly waived the privilege

by failure to exercise that degree of care consonant with the importance of the situation.

The argument that the electronic device is comparable to a third person, though neither party was aware of or consented to its use, is without merit.

The contention of defendants that they did no wrong but are merely seeking to use the fruits of the acts of others whether such acts were right or wrong reveals a callousness unexpected. The failure to plead *mea culpa* cannot obscure the facts. This legislative committee is a representative of the sovereign power; so was the agency—individual or collective—which installed and/or operated the device. To permit the one to benefit by the wrong of the other is to make a mockery of the privilege. 44

The privilege was grounded in good reason and sound policy—to permit men to confer and consult freely that their rights might be preserved or protected. The privilege does not attach where the conversation refers to future wrongdoing, and there is no such contention here.

When the privilege was created it took cognizance of conditions then existing. True, the theory changed from he honor of the lawyer to embrace and include the apprehensions of the client. Equally true is it that originally it probably dealt only with testimonial compulsion. Who could foresee the development of electronic devices making useless the most elaborate precautions to safeguard the confidences of attorney and client? Yet law is neither static nor inflexibly rigid. It is to be construed to effectuate the purpose intended, and therefore must be given a liberal construction. Indeed, to hold or sanction 45

46 *Opinion of Stevens, J.*

the installation of such devices in counsel rooms is to render worthless the privilege, and deprive any accused of a basic right under our law—the right to a free and impartial trial. It would only be necessary for one agency of government commit the act—pass over the results to another agency which might sanctimoniously disclaim responsibility but enjoy the fruits thereof. The use of such a subterfuge is unworthy of the sovereign.

47 Motion granted. Temporary injunction continued. Settle order.

48

Notice of Appeal to Court of Appeals. 49

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

[SAME TITLE.]

Sir:

PLEASE TAKE NOTICE that the plaintiffs above named hereby appeal to the Court of Appeals of the State of New York, from the judgment 50
in the above entitled action entered in the office of the Clerk of the County of New York, on the 16th day of May, 1957, which was entered upon an order of the Appellate Division of the Supreme Court, First Department, entered in the office of the Clerk of said Appellate Division on the 16th day of May, 1957, which said order reverses the orders of the Supreme Court at Special Term, dated May 1st and 3rd, 1957, and entered in the County Clerk's Office of the County of New York, (a) denying motion of defendants for judgment dismissing complaint and (b) granting plaintiffs' motion for an injunction 51
pendente lite,

PLEASE TAKE FURTHER NOTICE, that the plaintiffs appeal from each and every part of said judgment of said Appellate Division and from the

52 *Notice of Appeal to Court of Appeals*

intermediate order reversing Special Term's order granting an injunction *pendente lite.*

Dated: New York, New York, May 16th, 1957.

Yours, etc.,

EDWARD H. LEVINE, Esq.
Attorney for Plaintiff, Sylvester Cosentino
120 Broadway
New York, New York
and
53 MICHAEL P. DIRENZO, Esq.
Attorney for Plaintiff, Joseph Lanza,
253 Broadway
New York, New York

To:

Clerk of the County of New York
Archibald R. Watson

and

Boris Berkovitch, Esq.
Attorney for Defendants
15 Broad Street
54 New York, New York

Order of Reversal. 55

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the Appellate Division Courthouse, 27 Madison Avenue, City and County of New York, on the 16 day of May, 1957.

Present:

Hon. Charles D. Breitel,
Justice Presiding, 56
Hon. Benjamin J. Rabin,
Hon. Martin M. Frank,
Hon. Francis L. Valente,
Hon. James B. M. McNally,
Justices.

[Same Title.]

An appeal having been taken to this Court by the above named defendants-appellants from an order of the Supreme Court, New York County, Special Term, Part III, entered in the office of the Clerk of the County of New York on the 57
1st day of May, 1957, denying the cross-motion of said defendants-appellants for judgment dismissing the complaint,

And said appeal having been argued by Arnold Bauman, Esq., of counsel for the appellants, and by Edward H. Levine, Esq., of counsel for respondents, and due deliberation having been had thereon, and upon the decision and Per Curiam opinion filed herein on May 14, 1957.

58 *Order of Reversal*

It Is Unanimously Ordered that the order so appealed from be and the same hereby is reversed upon the law, and that said cross-motion for judgment dismissing the complaint herein be granted, and the Clerk is directed to enter judgment in favor of the defendant accordingly.

Enter,

C. D. B.

59

60

Judgment Appealed From. 61

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK.

JOSEPH LANZA and SYLVESTER COSENTINO, Plaintiffs, against NEW YORK STATE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, WILLIAM S. HORAN, Individually and as Chairman, ARNOLD BAUMAN, Individually and as Chief Counsel, Defendants.	Index No. 5063/1957 62

The above named defendants having appealed to the Appellate Division of the Supreme Court, First Judicial Department, by notice of appeal dated May 6, 1957, from an order of this Court, entered in the office of the Clerk of the County of New York on May 1, 1957, denying the defendants' cross-motion, made pursuant to Rule 106 of the Rules of Civil Practice, for judgment dismissing the complaint herein, and said appeal having been argued on the original papers, and said Appellate Division, by order dated May 16, 1957, and entered in the office of the Clerk of said Appellate Division on May 16, 1957, having unanimously ordered that the order so appealed from be reversed upon the law, and that said motion for judgment dismiss- 63

ing the complaint be granted, and directing the Clerk to enter judgment in favor of the defendants accordingly, and a certified copy of said order of the Appellate Division having been filed in the office of the Clerk of the County of New York on May 16, 1957,

Now, on motion of Boris S. Berkovitch, Esq., attorney for the defendants, it is

ADJUDGED that plaintiffs' complaint herein be
65 and the same hereby is dismissed.

Judgment signed and entered this 16 day of May, 1957.

ARCHIBALD R. WATSON,
Clerk.

Filed May 16 1957
New York County Clerk's Office

66

Opinion of Appellate Division.

Per Curiam—This proceeding involves the question whether a joint legislative committee may be restrained from making public a tape recording and a transcript thereof of the supposedly private consultation between attorney and client in a local county jail. The client had been arrested as a parole violator. While in the local jail he was permitted to confer with his lawyer. The room, unknown to the lawyer or the prisoner, was wired to record any conversations. In some manner the committee has obtained the tape recording and has made transcripts therefrom. It proposes to make such transcripts public, the contents of such transcripts being concededly within the scope of the inquiry. The client and his lawyer have brought this action to enjoin the committee.

Special Term denied the committee's motion to dismiss the complaint and granted plaintiffs' motion for a temporary injunction. The committee appeals.

Actually, the fact of the relationship of attorney and client is disputed by the committee. But for the purposes of this proceeding the Court assumes that such relationship subsisted at the time and place in question.

As a further preliminary, it is recognized that the wiring of the consultation room and the recording of conversations between an attorney and his client, even if within the precincts of a prison, was a gross and inexcusable violation. It was a violation both of the statutory privilege between attorney and client and the constitutional right of a defendant or prisoner to consult with his attorney privately. Such intrusion, subject, as it may be, to certain sanctions and

penalties which may exist under appropriate provisions of law, does not prevent the use of the products of such intrusion before an appropriate forum by third parties who may have obtained such tape recordings or transcripts thereof.*

The privilege between attorney and client is that of the client. This is personal. It is a closely protected right. Indeed, even the lawyer is powerless to waive it; only the client can.
71 Yet the privilege is one that controls only the secrecy of communication between lawyer and client, and does not extend to inhibit strangers in revealing what they know.

The law is quite clear that the privilege conferring confidentiality upon communications between attorney and client relates only to a privilege against testimonial compulsion (8 Wigmore, Evidence, 3rd ed., 1940, secs. 2325, 2326; Richardson on Evidence, 8th ed., 1955, sec. 438). This, too, was the square holding of this Court in *Ehrlich v. Ehrlich* (278 App. Div. 244), which was cited, seemingly with approval, in *People v.*
72 *Decina* (2 N. Y. 2d 133, 145).

In the *Ehrlich* case a husband and wife were involved in matrimonial litigation. During the litigation the husband obtained telephone recordings of conversations between the wife and her lawyer and sought to use them upon a second trial, for which he had made an application. This Court held that the statutory privilege under Civil Practice Act, Section 353, subsisted. It had not been destroyed by the fact of surreptitious interception, but the contents of such con-

* See, however, L. 1957, chap. 880, eff. July 1, 1957. Cf., S. Int., 283 Pr. 283 (1957 Session—vetoed by the governor).

versations having become available to third parties, there was no privilege or rule which prevented their use in evidence.

In the *Decina* case the Court of Appeals, in holding that a confidential communication between physician and patient was nonetheless privileged, although two police guards overheard the conversations, referred to the *Ehrlich* case as holding that the privilege was not destroyed So, in this case, it is quite clear that the privilege of attorney and client between Mr. Lanza 74
and his lawyer, assuming the relationship, was neither waived nor destroyed by reason of surreptitious interception. But there is no limitation, insofar as privilege is concerned, on the use by third parties of what had been revealed of these confidential communications, so long as the third parties are not subject to any testimonial inhibition.

Of course, communication between an attorney and his client, especially where the client is a defendant in a criminal matter, involves much more than a mere privilege. Also involved
is the right to counsel, which carries with it the 75
corollary right to communicate with counsel in secrecy and confidence, and without intrusion, especially by public officials. In this case that constitutional right was violated, and, indeed, violated in an atrocious and inexcusable manner. The right, however, having been once violated, the information came into the hands of a number of public agencies from whom, or with respect to whom, the client had reason to fear prejudice. Unfortunately, a secret revealed may not be retrieved. That knowledge is irrevocably

theirs. As a matter of fact, even in this action, plaintiffs do not seek to restrain all public agencies having the information, but have singled out the committee. This does not mean, however, that the confidential communications thus obtained may be used against Mr. Lanza in any proceeding in which he is the target Indeed, they may not (*People v. Cooper*, 307 N. Y. 253; *Matter of Fusco v. Moses*, 304 N. Y. 424; *Coplon v. United States*, 191 F. 2d 749, 759).

77 The legislative inquiry, however, is another thing. It is concerned presently with the manner in which parole is handled in this state. As such, there is neither evidence nor is there any testimony involved which comes within the statutory privilege. Nor does the right to a fair trial or the constitutional right to counsel with reference to Mr. Lanza become involved. Consequently, neither the tape recordings nor transcripts thereof are precluded from use by any existing rule or provision of law.

Another serious question is raised. That question is whether a Court may, by prior restraint,

78 enjoin a proceeding of an arm of the legislative branch of government on the ground that the evidence it would use might not be received in a court of law because of some violation of law or constitutional right, either in the obtaining of it or by its use in evidence (see *Nelson v. United States*, 208 F. 2d 505, 513; *Hearst v. Black*, 87 F. 2d 68, 71; *Methodist Fed. for Social Action v. Eastland*, 141 F. Supp. 729, 731; cf. *Matter of Withrow*, 176 Misc. 597, 603; *Greenberg v. O'Brien*, 149 Misc. 866, aff'd 240 App. Div. 970; *Mezey Motors v. O'Dwyer*, 195 Misc.

160; for a *dictum semble contra* see *Matter of Edge Ho Hldg. Corp'n*, 256 N. Y. 374, 380). Some of the court feels that this threshold issue must be first determined and conclude that the Court is without further power to interfere. If pressed to decide the merits, they would determine otherwise. A majority, however, feels bound by the recognized principle that a constitutional question will not be reached unless it is unavoidable (*Matter of Peters v. N. Y. City Housing Authority*, 307 N. Y. 519, 527). Hence, 80
since the evidence in question is not subject to exclusion, we need not go so far as to determine that difficult constitutional question. On either view the same conclusion follows, namely, that the orders must be reversed.

Accordingly, the order granting the motion for temporary injunction should be reversed and the motion denied, and the order denying the cross-motion to dismiss the complaint for insufficiency should be reversed and the motion granted.

Settle orders on one day's notice. In the meantime plaintiffs may, if so advised, apply to the Court of Appeals for such relief as may 81
be appropriate.

All concur.